United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: March 30, 2010

TO : Alan B. Reichard

Regional Director, Region 32

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: American Red Cross 530-8045-3700

Case 32-CA-24517 530-8045-3725 530-8054-1000

This case was submitted for advice as to whether the Employer violated Section 8(a)(5) by making unilateral changes to its pension and 401(k) plans during the term of a contract. We conclude that both the pension and 401(k) plans contain reservation of rights clauses that privilege the Employer to make the changes it made to both plans, and that the language in the parties' collective-bargaining agreement was sufficient to incorporate those reservation of rights clauses into the collective bargaining agreement. Consequently, the Employer was privileged to exclude new hires from its existing pension plan and to terminate its contributions to the 401(k) plan.

FACTS

The Union represents a multi-location unit of registered nurses, licensed vocational nurses, and reference technologists employed by the American Red Cross, Northern California Blood Services Region (Employer). The parties had a collective-bargaining agreement that was in effect during the period January 8, 2007, through March 31, 2009. Bargaining for a successor contract began in March, and on March 23, the parties signed a written agreement extending the 2007-2009 collective-bargaining agreement until their next bargaining session, which had not yet occurred when the Employer made the changes at issue here.

In January 2009, the Employer's national organization, the American Red Cross (herein called ARC), formed a "Cost Savings Team" to look at organization-wide systems and practices where cost savings might be achieved. Included in this review were the ARC's national retirement and 401(k) savings plans. As a result of this review, the ARC

¹ All dates refer to 2009 unless otherwise indicated.

made a decision to close its pension plan to new employees, effective July 1, and to suspend its matching contributions to the 401(k) savings plan effective the first paycheck of May 2009. It appears that ARC communicated these changes to its national plans to employees through its internal publication "CrossNet" (which is available on ARC's intranet website) and, separately, through an April 2 email from ARC National President/CEO Gail McGovern to employees. At this point, the Union had not been notified of the changes.

On April 13, Union representative Maureen McManus met with the Employer's human resources manager, Doris Velasquez, to discuss staffing issues and the need to reduce employees' hours because of a decrease in the demand for blood supplies. During the course of this meeting, Velasquez told McManus that the Employer was going to eliminate Employer contributions to the 401(k) savings plan and that the Employer would also stop providing retirement benefits for any employees hired after July 1. Velasquez showed McManus a copy of Gail McGovern's April 2 e-mail that had been sent to employees advising them of these changes. McManus responded by telling Velasquez that she did not think the two of them should be talking about deleting the retirement plan for new hires and eliminating the contributions to the 401(k) savings plan for the existing nurses since the parties were in the middle of bargaining.² Velasquez said she thought that the contract had "me too" language that allowed the Employer to make such changes. 3 McManus again said she did not think they should be discussing those subjects of bargaining, at which point the conversation ended.

On April 16, McManus sent a letter to Velasquez which, inter alia, stated, "I must request that benefits,

 $^{^2}$ The parties had reached tentative agreement during their March negotiations to move the contractual 401(k) language from Article 33 to Article 31 - which as described below was titled RETIREMENT BENEFITS and which included the defined pension plan - but there had been no discussions or agreements relating to the substantive terms of either the retirement plan or the 401(k) savings plan.

³ Velasquez's "me too" reference apparently was to Article 31 of the collective-bargaining agreement, discussed below, which allows changes or amendments to the national retirement plan of The American Red Cross, so long as those changes are uniformly applied to all of the Employer's employees.

including 401(k), pension or health plans not be deleted, modified, changed or amended. As these are subjects of terms and conditions of bargaining." McManus' letter went on to state that the contract's management rights language does not allow the Employer to change benefits. On April 17, Velasquez stated in writing that the changes to the retirement and 401(k) savings plans were in compliance with Article 31 and Article 33.9 of the parties' collective-bargaining agreement.

On April 30, the ARC retirement plan was officially amended to state that participation in the plan was closed to employees hired on or after July 1. On that same date, the ARC 401(k) savings plan was amended to state that ARC matching contributions would be suspended effective for pay dates on or after May 1; that if ARC matching contributions are reinstated thereafter, they would be discretionary; and that a discretionary non-elective ARC contribution would be implemented for eligible employees hired or rehired on or after July 1.

The parties' 2007-2009 collective-bargaining agreement contains the following provisions relating to a defined benefits retirement plan and 401(k) savings plan for bargaining unit employees:

ARTICLE 31 RETIREMENT BENEFITS

The bargaining unit employees will participate in The American Red Cross Retirement System, as amended from time to time at the sole discretion of The American Red Cross. The parties agree that any future changes or amendments to the National Plan will automatically apply to the bargaining unit employees to the same extent that such changes or amendments apply to other Employer's employees. The Employer, the Union and the employees are bound by the terms of said retirement plan, and issues regarding the Plan shall not be subject to the grievance or arbitration provisions.

ARTICLE 33 WAGES

33.9 401(k) Savings Plan

A 401(k) savings plan is made available through the National Retirement System.

The retirement plan and the 401(k) savings plan documents contain reservation of rights provisions on which the Employer relies as justification for the unilateral

changes it made to employee retirement benefits. In that regard, Section 12.1(a) of a document entitled, "Retirement System of the American National Red Cross," which originally became effective in 1936, includes the following provision:

Right to Amend. The American National Red Cross reserves the right to amend the System at any time, in whole or in part, including, without limitation, retroactive amendments necessary or advisable to qualify the System and the Trust under the provisions of Code section 401(a). All amendments shall by adopted in writing by The American National Red Cross.

Section 12.3(a) of that same document provides as follows:

While it is the intention of The American National Red Cross to continue the System in operation indefinitely, The American National Red Cross reserves the right by action of the Board of Governors to terminate the System in whole or in part.

In addition, the Summary Plan Description of the American Red Cross Retirement System Plan includes a section entitled, "Plan Amendment, Modification and Discontinuance," which states that "[t]he right to amend, suspend or terminate the Retirement System and its corresponding Trust is reserved to the American National Red Cross."

Section 7.2 of the 401(k) savings plan contains the following provision:

Although the Employer has established the Plan with the intention and expectation that it will make contributions indefinitely, nevertheless the Employer shall not be under any obligation or liability to continue its contributions or to maintain the Plan for any given length of time. The Employer may in its sole and absolute discretion discontinue contributions or terminate the Plan in whole or in part in accordance with its provisions at any time without any liability for the discontinuance or termination. If the Plan shall be terminated or partially terminated or if contributions of the Employer shall be completely discontinued, the rights of all affected Participants in their Accounts shall become one hundred percent (100%) vested and nonforfeitable notwithstanding any other

provisions of the Plan. However, the Trust shall continue until all Participants' Accounts have been completely distributed to or for the benefit of the Participants in accordance with the Plan.

ACTION

We conclude that the Employer was privileged to close its pension plan to new hires, and to suspend its contributions into the 401(k) plan for all employees, because it made those changes during the term of the contract, the plans themselves contain reservation of rights clauses giving the ARC the right to modify and/or terminate these plans, and the collective-bargaining agreement between the parties incorporated those plan documents by reference. Accordingly, this charge should be dismissed, absent withdrawal.

An employer violates Section 8(a)(5) when it makes a unilateral change in unit employees' terms and conditions of employment without first giving the union notice and an opportunity to bargain over the change.⁴ It is well established that retirement plans and 401(k) contributions are mandatory subjects of bargaining.⁵ Thus, an employer violates Section 8(a)(5) when it changes such mandatory subjects without bargaining to agreement or impasse with the union, unless privileged to do so by a union waiver of bargaining rights.⁶ A union's waiver of bargaining rights must be "clear and unmistakable."

Here, Section 12.1(a) of the pension plan reserves to the Employer the right to "amend the System at any time, in whole or in part" and Section 12.3(a) gives the Employer the right "by action of the Board of Governors to terminate the System in whole or in part." Similarly, Section 7.2 of the 401(k) plan reserves to the Employer the right to "in

⁴ See NLRB v. Katz, 369 U.S. 736, 742-743 (1961).

⁵ See, e.g., <u>Convergence Communications</u>, 339 NLRB 408 (2003); Trojan Yacht, 319 NLRB 741, 747 (1995).

⁶ Long Island Head Start Child Development Services, 345 NLRB 973, 973 (2005), enf. denied on other grounds 460 F.3d 254 (2d Cir. 2006), on remand 354 NLRB No. 82 (September 25, 2009).

 $^{^{7}}$ See, e.g., Provena St. Joseph Medical Hospital, 350 NLRB 808, 810-813 (2007).

its sole and absolute discretion discontinue contributions or to terminate the Plan in whole or in part..." The Employer's actions in excluding new hires from its pension plan and in terminating its contributions into the 401(k) plan are explicitly authorized by the plan documents. Therefore, these plan documents would constitute a clear and unmistakable waiver of the Union's right to bargain regarding the Employer's actions, if those plan documents were incorporated by reference into the collective bargaining agreement signed by the parties.

In Mary Thompson Hospital, 8 the Board held that a collective-bargaining agreement specifically incorporated the entire pension benefit plan document, including a clause reserving to the employer the right to "modify, suspend, or terminate" the pension plan, when the contract stated the pension benefit plan was "incorporated in this Agreement for all eligible employees." There is no meaningful difference in the language embodied in Article 31 RETIREMENT BENEFITS of the instant contract, i.e., "The Employer, the Union and the employees are bound by the terms of said retirement plan..." and the language found sufficient to bind the Union to the pension plan document in Mary Thompson Hospital. Consequently, we conclude that the parties to the collective bargaining agreement have incorporated the American Red Cross Retirement System documents into that agreement. We further conclude that the 401(k) Savings Plan described in Article 33.9 of the same contract as being "made available through the National Retirement System" is a component of the American Red Cross Retirement Plan which, as set forth above, is referenced in Section 31 of the contract. As such, that plan document also is incorporated into the collective-bargaining agreement. Accordingly, the Union has waived its bargaining rights with regard to the modification and/or termination of either the Pension or the 401(k) plan, and the instant charge should be dismissed, absent withdrawal.

B.J.K.

 $^{^8}$ 296 NLRB 1245, 1246-1247, 1249 (1989), enf'd, 942 F.2d 741 (7th Cir. 1991). Cf. Bath Iron Works, 345 NLRB 499 (2005) (no 8(d) violation where contract states that "[a]ll of the terms and conditions in their entirety are governed by the Plan Documents").